

HUGH A. TIPTON

IBLA 80-836

Decided June 1, 1981

Appeal from decision of Administrative Law Judge Michael L. Morehouse affirming a decision of the Acting District Manager, Winnemucca District, Bureau of Land Management, rejecting an application to modify grazing use to allow grazing of certain cattle all year. N 2-79-6.

Affirmed.

1. Grazing Permits and Licenses: Adjudication -- Grazing Permits and Licenses: Appeals

A decision of the Bureau of Land Management which does not reduce applicant's grazing use on an allotment but which restricts such use to the primary grazing season and precludes limited use during the winter will be sustained as an exercise of the discretionary authority to manage grazing lands where the record establishes a rational basis for that decision consistent with range management objectives.

APPEARANCES: Hugh A. Tipton, pro se; Burton J. Stanley, Esq., Office of the Regional Solicitor.

OPINION BY ACTING ADMINISTRATIVE JUDGE GRANT

Hugh A. Tipton appeals from a decision of Administrative Law Judge Michael L. Morehouse dated July 11, 1980, affirming a decision issued by the Acting District Manager, Winnemucca District, Bureau of Land Management (BLM), on March 27, 1979, rejecting Tipton's application to graze six head of cattle from October 1, 1979, through February 28, 1980. The decision did not reduce appellant's authorized grazing use which was previously set at 840 animal unit months (AUM's) of active use, but allocated the entire use to the grazing season from March through September. This decision, which sets forth the Acting

District Manager's reasons for the rejection, reads in pertinent part as follows:

I have considered your amended application received on March 12, 1979, for grazing use on the public lands. Your amended application and this decision voids and supersedes my proposed decision dated February 16, 1979; and my Final Decision dated February 22, 1979.

As a result of your amended application my decision is as follows:

Approve:

<u>Allotment</u>	<u># & Kind</u>	<u>From</u>	<u>To</u>
Pumpernickle	30 C	03-1-79	03-31-79
Pumpernickle	135 C	04-01-79	09-30-79
* * *	* *	*	

Reject:

Pumpernickle	6 C	10-1-79	02-28-80
* * *	* *	* *	

For The Reason That:

An authorization to graze 6 head of livestock on the Federal Range during the time that the remainder of your livestock are off the Federal Range would not be consistent with the management objectives on the Pumpernickle Allotment.

This action is in accordance with 43 CFR 4120.2 which states:

Livestock grazing permits and leases shall contain terms and conditions necessary to achieve the management objectives for the public lands and other lands under Bureau of Land Management control identified in land use plans.

and also in accordance with 43 CFR 4120.2-1(a) which states:

The authorized officer shall specify the kind and number of livestock, the period(s) of use, the

allotment(s) to be used, and the amount of use, in animal unit months, that can be made in every grazing permit or lease. The authorized livestock grazing use shall not exceed the livestock grazing capacity and shall be limited or excluded to the extent necessary to achieve the objectives established for the allotment.

The following facts were presented through testimony at the hearing. The Pumpernickle allotment is approximately 18 miles by 25 miles and is partially fenced (Exh. R-1, Tr. 14). Appellant has grazing privileges on this allotment along with two other cattle operators, and one sheep operator (Tr. 7). In the past, appellant had a year-round, staggered permit which entitled him to graze the bulk of his herd from March through September and approximately 30 head in the winter (Tr. 49). In his application for the 1979 grazing season, appellant requested six head of cattle from October 1, 1979, through February 28, 1980, because he wanted a "cushion against trespass" (Tr. 6). 1/

Brad Hines, BLM Area Manager, who made the recommendation to reject appellant's application to graze six head of cattle, testified that the management objective is to preserve the condition of the forage on the allotment through custodial or limited rather than intensive management (Tr. 26). He further stated that an ear-tagging program was implemented to facilitate range management (Tr. 8-9). Hines explained that the purpose of ear-tagging is to avoid counting the number of livestock on the range (Tr. 22). This is accomplished by issuing each permittee the same number of tags as the number of cattle he is authorized to graze on the range (Tr. 9). In this way checks for trespass can be implemented by checking for untagged livestock rather than by counting head of livestock (Tr. 22) which latter method is much more difficult from an administrative standpoint (Tr. 10). Hines explained that use of ear tags to monitor compliance is impaired if the number of authorized cattle varies during the course of the year as then compliance during periods of reduced use can only be monitored by counting individual livestock (Tr. 9-10, 20-22). Thus, if six cattle were authorized between October and February, the fact that they bore ear tags would provide no assurance against trespass unless and until a search and count established that there were no more than six. This would defeat one of the objectives of the ear tag program.

Judge Morehouse affirmed the District Manager's decision as a valid exercise of administrative discretion because appellant had

1/ Appellant explained that "a few stragglers" might not be gathered and removed from the allotment at the close of the specified grazing season because of the inaccessibility of the mountainous terrain. The requested six cow authorization during the interim would provide a "cushion" against a finding that such cattle unwillingly left on the allotment were trespassing.

failed to prove by a preponderance of the evidence that under the circumstances the decision was arbitrary and capricious.

In his statement of reasons for appeal appellant contends that the District Manager's decision based on the fact that the requested authorization "would not be consistent with the management objectives of the Pumpnick allotment" is arbitrary, capricious, and unreasonable because exhibit R-2 indicates that objectives for the allotment have not yet been established. Further, appellant contends that six head of cattle on the range would not be detrimental to the forage and that BLM did not establish how exclusion of six head of cattle from the range would facilitate range management.

In response, BLM states that appellant's application for a year-round permit for six head of cattle is completely inconsistent with the purposes of BLM in imposing an ear-tagging requirement for the enforcement of trespass. Counsel for BLM contends appellant has failed to meet the burden of showing that the District Manager's decision is arbitrary and capricious.

The sole issue before us is whether BLM's decision rejecting appellant's application for a year-round grazing permit for six head of cattle on the ground that it would be inconsistent with BLM's grazing management objectives on the allotment is arbitrary and capricious.

[1] Implementation of the Taylor Grazing Act of 1934, as amended, 43 U.S.C. §§ 315, 315a-315r (1976), is committed to the discretion of the Secretary of the Interior. Kenneth H. Earp, 50 IBLA 235 (1980); Andrew H. L. Anderson, 32 IBLA 123 (1977). A decision made in the exercise of discretion will be sustained where it is supported by a rational and defensible basis and is therefore not arbitrary and capricious. Kenneth H. Earp, *supra*; Andrew H. L. Anderson, *supra*; Claudio Ramirez, 14 IBLA 125, 127 (1973).

Section 2 of the Taylor Grazing Act specifically charges the Secretary with respect to grazing districts on public lands to "make such rules and regulations" and to "do any and all things necessary * * * to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range." 43 U.S.C. § 315a (1976). 2/ Departmental regulation 43 CFR 4120.2 states that livestock grazing permits and leases shall contain terms and conditions necessary to achieve the management objectives for the public land. 43 CFR 4120.2-1(a) provides that the authorized officer shall specify the

2/ Provisions of the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2743 reinforced the Federal commitment to protection and improvement of the Federal range lands. See 43 U.S.C. §§ 1751-1753 (1976).

kind and number of livestock, the period(s) of use, the allotment(s) to be used, and the amount of use, in animal unit months that can be made in every permit or lease.

Under 43 CFR 4120.4(d), BLM has initiated an ear-tagging program for the Winnemucca District. The objective of the program is the efficient use of resources to control unauthorized grazing use. BLM rejected appellant's application to graze the six head of cattle because allowing those animals to graze during the winter months would interfere with achieving this management objective. Hines' testimony showed how ear-tagging facilitates BLM's work of supervising the range and how allowing appellant the six cattle requested would impair the usefulness of this program. Hines' explanation of the program provides a rational basis for BLM's decision.

Appellant claims that the decision is arbitrary and capricious because it is based on management objectives which, according to the testimony, had not yet been formulated. This contention is based on a paragraph in a memorandum of April 20, 1979, to the State Director from the District Manager which reads:

In reference to Mr. Tipton's question as to what the management objectives for the Pumpnickel allotment are: The objectives for the allotment are to run livestock in accordance with the authorized grazing permit and in a manner which will benefit both the livestock operation and protect the resources against any detrimental effects. This will be done in the most efficient way possible with the existing data the BLM has at the present time. The issuance of a license for six head of cattle for the winter is in no way efficient for supervision by the BLM or good management for a livestock operation. The final objectives for the allotment will be established in the upcoming URA and MFP planning process.

Contrary to appellant's contention, this memorandum shows that BLM did have specific management objectives. The fact that they were not "final" is immaterial. Also, Hines' testimony showed that while certain management objectives would change as a result of the environmental impact statement (Tr. 26, 27), BLM's management objective of controlling trespass through the ear-tagging program was clearly defined (Tr. 7-13).

The record establishes a rational basis for the decision which has not been refuted by appellant. Although we do not hold that efficiency of grazing management, including control of unauthorized use, or the mere administrative convenience of BLM would necessarily justify limiting seasons of use, the understandable desire of appellant

for a cushion against trespass of six head of cattle during the winter months does not warrant our overturning the decision below. Appellant has not met the burden of showing by substantial evidence that the decision is improper or that he has not been dealt with fairly. Claudio Ramirez, supra; United States v. Maher, 5 IBLA 209, 219, 79 I.D. 109, 114 (1972). Accordingly, the decision must be sustained.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Acting Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Edward W. Stuebing
Administrative Judge

